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Equity--Jurisdiction--Attachment in Action Ex Delicto

E. H. Y.
West Virginia University College of Law

the coal in place, usually to be ascertained by finding its value at the pit-mouth or loading tipple, and deducting therefrom the expense of mining and carrying it to the pit-mouth or tipple." The decision follows the Spruce River Case, and is in accord with a leading Missouri case. *Austin* v. *Huntsville Coal & Mining Co.*, 72 Mo. 535. But it should be noted that the value at the pit-mouth, less the cost of getting it there, does not necessarily represent the value of the coal in place, but usually is greater; and that to give the plaintiff the pit-mouth price in damages is to compensate him for more than he has been injured, and to deprive the innocent trespasser of the profits of his labor expended in good faith.

—G. D. H.

EQUITY—JURISDICTION—ATTACHMENT IN ACTIONS EX DELICTO. —A entered into a contract with B whereby A was to obtain coal lands and B was to sell them, the profits to be divided between them. B sold the lands, but failed to account for the profits. B prepared to remove from the state all the profits derived from the sales and A brought a bill in equity praying that B be required to make a full discovery of said sales and that an accounting be had, and pursuant to section 1 of chapter 106 of the Code a process of garnishment was issued against the persons with whom the said funds had been deposited by B. The court *held*, by way of dictum, that under this section courts of equity have no jurisdiction as to causes of action *ex delicto*. *Snyder* v. *Breitinger et al.*, 130 S. E. 96, (W. Va. 1925).

The construction of this section as expressed in the above dictum seems now to be the well settled rule in this state. *Swarthmore Lumber Co.* v. *Parks*, 72 W. Va. 625, 79 S. E. 723; *Mabie* v. *Moore*, 75 W. Va. 761, 84 S. E. 788. But it will be noted that an earlier case did not so construe this section. In the case of *McKinsey* v. *Squires*, 32 W. Va. 41, 9 S. E. 55, it was contended that as the cause of action alleged in the bill was for unliquidated damages for a personal injury, a court of equity had no jurisdiction. The court said: "It is unquestionably true that this statute (referring to the above section) must be construed strictly, but its language is so direct and positive that it does not admit of construction. It authorizes a suit by attachment in equity to recover damages for any wrong." Judge Poffenbarger in *Swarthmore Lumber Com-*

pany v. *Parks, supra,* in discussing the last paragraph of the section, authorizing an attachment in a court of equity for a debt or claim, legal or equitable, whether the same be due or not, upon any of the grounds stated, said: "In this clause, the words "debt or claim" do not include damages for a wrong. By the first paragraph of the section an attachment is given in actions to recover such damages, but the last paragraph, conferring special equity jurisdiction, carefully omits claims arising out of tort. The first paragraph enumerates three classes of actions, those for claims or debts arising out of contracts and damages for wrongs. But two of these are enumerated in the last paragraph. The omission clearly signifies intent not to allow an attachment in equity for causes of action *ex delicto.*" The question probably turns on the proper definition to be given to the word "claim." Would it not be possible to argue that it was the legislative intent to have the word "debt" refer to causes of action *ex contractu* and the word "claim" refer to causes of action *ex delicto?* What is a claim? Construing a statute allowing an attachment in actions at law upon a demand, whether liquidated or not, arising upon a contract or a judgment, or a decree requiring plaintiff to specify the amount of his "claim", and the grounds therefor, the court in *Saddlesvene* v. *Arms,* 32 How. Pr. (N. Y.) 280, said that the word "claim" is the equivalent of a debt or demand arising out of the express or implied terms of a contract. Stimson's Law Dictionary defines the word "claim" as a demand of some matter as of right made by one person upon another, to do or forbear to do some act or thing as a matter of duty. Bouvier's Law Dictionary defines the word "claim" as a challenge of the ownership of a thing which is wrongfully withheld from the possession of the claimant. In a popular sense, claim is a right to claim; a just title to something in the possession or at the disposal of another. The assertion of a liability to the party making it to do some service or to pay a sum of money. Conceding that there may be some room for argument that the word "claim" as used in the last paragraph of the section in question should be construed to include damages for a wrong, and that, as has been urged, the court established the rule laid down in *Mabie* v. *Moore,* and mentioned with approval in the principal case, for its convenience, hoping to restrict general equity jurisdiction, did not the court in doing so wisely construe the statute? As Judge Lynch said, in *Mabie* v. *Moore,* if the statute provides for an attachment in a suit in equity for the recovery of damages for any wrong the inevitable, logical conclusion to be drawn from such a

construction of the statute would be to confer on courts of equity jurisdiction to entertain suits for the recovery of damages for assault and battery, adultery, seduction, or any other wrong to the person or property of another, solely by virtue of an attachment sued out on any of the grounds mentioned in the statute. Surely, such was not the legislative intent.

—E. H. Y.

EVIDENCE—IMPEACHING CREDIBILITY BY PREVIOUS CONVICTION—While D, on trial for forgery, was being cross-examined as a witness on his own behalf, he was asked if he had not previously been convicted for breaking jail, while he was being confined for complicity in breaking into a drugstore. It was moved to strike out the question and answer, but the trial court refused to do so, on the ground that it was competent evidence as affecting the credibility of the witness. Held, that this was error. *State* v. *Webb,* 128 S. E. 97 (W. Va. 1925).

In its opinion the Supreme Court of Appeals draws a distinction between the accused as a witness and other witnesses for the defense. It has been stated that upon the examination of a witness called to impeach the credibility of another witness,—in this case, for the state,—questions involving general character other than those directly concerning the witness' veracity, are not permitted. *Uhl* v. *Commonwealth,* 6 Gratt. 706. It is difficult to see why this rule should not apply to all witnesses. The reason for following the rule in the principal case is thus stated by Lively, J., "Many persons have been convicted of crimes and misdemeanors engendered by heat of passion and inconsiderate action, infirmities in human nature which are more or less prevalent in all. We can see no reason why such convictions would affect the credibility or veracity of such a person who is being tried for a subsequent and wholly unconnected offense." It would seem that this reasoning should apply with equal force to any witness. Yet the court, in this same case, discusses and sustains the distinction in *State* v. *Hill,* 52 W. Va. 296, in which it is laid down that a witness for the defense,—other than the accused,—may be asked, in order to discredit him, if he has been confined in the penitentiary. A *defendant,* testifying in his own behalf, is protected on cross-examination *by the same rules,* regarding the admissibility of evidence *as are*